IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 57

BOYD LEEDOM, ET AL., AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF THE CASE

For several years after enactment of the Labor Management Relations Act, 1947, the National Labor Relations Board repeatedly held that it had no authority to question the truth of non-Communist

affidavits filed under section 9(h) of the Act. It officially asserted that under the terms of the Act and the legislative intent, the sole sanction for a false affidavit was the criminal prosecution provided by the section itself, and that the Board had no function in the matter other than to refer suspect cases to the Department of Justice.[1] By March 18, 1952, the Board had applied this hands-off policy in 55 instances where falsification of 9(h) affidavits was alleged or suspected.[2] And on that date, the chairman of the Board told the Senate Labor Committee that Congress had "wisely spared" the Board the task of determining whether union officers were Communists. He pointed out that the Board's expertness is in the area of collective bargaining whereas investigation in the "field of subversive activities" calls for "a different sort of expertise and for special investigative techniques, not only unfamiliar to our staff but inconsistent with the open-court procedures of a quasi-judicial agency."[3]

Before the year was out, however, the Board reversed its position. In December 1952, the Board

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[1] Board decisions: *Matter of Alpert and Alpert*, 92 NLRB 806; *Matter of American Seating Co.*, 85 NLRB 269; *Matter of Craddock-Terry Shoe Corp.*, 76 NLRB 842; *Matter of Sunbeam Corp.*, 89 NLRB 469; *Matter of Sunbeam Corp.*, 93 NLRB 1205.

Board testimony before Congressional committees: Testimony of Board Chairman Herzog in *Hearings before Senate Subcommittee of Committee on Labor and Public Welfare, Communist Domination of Unions and National Security*, pp. 91, 94, 104-5 (March 18, 1952); Testimony of Board General Counsel Bott in same *Hearings*, p. 114.

Board Reports: *Fourteenth Annual Report*, p. 15; *Sixteenth Annual Report*, p. 48.

[2] *Hearings, supra*, ftn. 1, at p. 91.

[3] *Id.* at p. 94; see *infra*, pp. 13-14.

initiated a proceeding to cancel the compliance status of three unions unless they satisfied the Board that 9(h) affidavits filed by their officers were truthful. This proceeding was enjoined, the Court of Appeals for the District of Columbia holding that the Board had exceeded its authority. *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, cert. denied, 347 U.S. 943.

The opinion of the Court of Appeals left open one possibility for the Board's exercise of decompliance power, by stating (at 39): "We need not decide whether the union would be barred from the Act's benefits if its membership was aware of the alleged falsity of the affidavit." This reserved point was eventually decided against the Board in February 1955 by *Farmer* v. *International Fur & Leather Workers Union*, 221 F. 2d 862.

In the meantime, however, the Board, seeking to squeeze through the possible aperture of "membership awareness," initiated the proceeding which led to this litigation.[4] On February 4, 1954, the Board ordered an "administrative investigation and hearing" to determine whether 9(h) affidavits executed between August 1949 and November 1953, inclusive, by Maurice E. Travis, the secretary-treasurer of the respondent (hereafter called the Union), were false to the knowledge of the Union's membership (R. 4, 24).

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[4] Also in the interim, the Board had been blocked in its second attempt to decomply the Fur & Leather Workers Union. The District Court enjoined the Board from suspending that union's compliance status because the union's president, Ben Gold, had been indicted on charges of having filed a false 9(h) affidavit. *Fur Workers* v. *Farmer*, 117 F. Supp. 25, cert. den. 347 U. S. 943.

After a hearing before a Board examiner, the Board on February 1, 1955, entered a Determination and Order wherein it found that the affidavits executed by Travis between August 1949 and November 1953, and also, apparently, his last 9(h) affidavit, executed on October 19, 1954,[5] were false to the knowledge of the membership of the Union. The Board ruled, accordingly, that the Union was not and had not been in compliance with the filing requirements of section 9(h), and it ordered that no further benefits under the Act be accorded the Union. (R. 23-31.)

The Board's findings were based on a public statement issued by Travis in August 1949, the time when he first signed a 9(h) affidavit. In this statement, Travis announced that he had resigned from the Communist Party in order to be able to execute the affidavit. He declared that he did not believe in or advocate the overthrow of the government by force and violence and that in his opinion neither did the Communist Party. He also said that he considered his belief in Communism to be consistent with the best interests of the members of the Union and the American people generally. (R. 76-79.)

The Board ruled that this statement "when read literally, conclusively established Travis' admission of the falsity of his initial non-Communist affidavit" in that Travis "was patently admitting the falsity of the affidavit in which he disavowed *belief* in the forceful

[5] This last affidavit, on which the Union's compliance status was based after October 19, 1954, was filed after the hearing was concluded (R. 24). Since the Board decomplied the Union for the period after October 19, 1954 (R. 31-32), it must have treated the last affidavit, on which no hearing had been held, as false to the knowledge of the Union's members.

overthrow of the Government, and *support* of the Communist Party, an organization that believes in and teaches such forceful overthrow of the Government" (R. 26, Board's emphasis). The Board reached this result by reasoning that Travis, in saying that neither he nor the Communist Party believed in violent overthrow, was thereby admitting that he did believe in violent overthrow and was also thereby supporting an organization (the Communist Party) which he knew believed in violent overthrow (R. 26-27). By this process, the Board's "literal reading" of Travis' statement transformed literal denials into admissions of the contrary.

This ingenuity would have been wasted, however, unless the Board likewise found that the 9(h) affidavits filed by Travis after 1949 were also false. Under the Act, a 9(h) affidavit has vitality for no more than twelve months. Travis' 1949 affidavit was, therefore, functus officio, and the Union's compliance status at the time of the Board's Determination and Order rested on an affidavit executed by him on October 19, 1954 (R. 4).

Whatever Travis' August 1949 statement "admitted" about the affidavit he then signed, it obviously could not admit the falsity of affidavits in the present tense filed years later. Nevertheless, the Board held that the seven affidavits executed by Travis between December 20, 1949 and October 19, 1954, were also false because there was no proof that Travis had abandoned the belief and support of violent overthrow which he had "admitted" in his August 1949 statement (R. 27).

The Board then found that the Union membership of 100,000 persons (R. 2) was aware of the falsity of

all eight affidavits executed by Travis between August 1949 and October 19, 1954. It did so on the ground that Travis' exculpatory August 1949 statement, which was "literally read" by the Board to be an admission of guilt, had been published in the Union's newspaper (R. 27-28).

The Board also held on two grounds that the Union was not entitled to offer evidence that the Union members in fact believed that Travis' affidavits were truthful. First, the Board ruled, the Union had already had its "day in court" before the hearing examiner (R. 30). The facts show, however, that the contrary was true. For the hearing examiner had refused to allow the Union to introduce such evidence on the grounds that it was irrelevant because the General Counsel for the Board had failed to make a prima facie showing on the membership awareness issue (R. 74-75).[6] The second reason given by the Board was that evidence that the Union members believed that Travis' affidavits were truthful was irrelevant to the Board's determination that the members knew that the affidavits were false. The Board stated (R. 31):

> "In any event, we are of the opinion that denials of awareness by some individual Union members could not rebut the conclusive evidence of awareness we have found from the publication and distribution of the article to the membership. Nothing probative would be added to the record

[6] This ruling, made at the close of the General Counsel's case, would, if adhered to, have been fatal to the Board's theory of power. The hearing examiner reversed his position in his recommended decision issued after the close of the hearing (R. 68-69). Thus the Union never had an opportunity to introduce the evidence it had sought to adduce.

even if individual Union members might be produced to testify (contrary to what an ordinary, reasonable person would conclude) that they did not so construe the article."

The Union sued to enjoin the Board's decompliance action, alleging that the Board had exceeded its authority, that the Board's findings were not supported by the evidence, and that the hearing was unfair because the Union had been deprived of the opportunity to offer relevant evidence on the issue of membership awareness (R. 1-7). The District Court denied a preliminary injunction (R. 10-12), and the Court of Appeals peremptorily reversed (R. 113). The District Court refused to carry out the judgment of the Court of Appeals (R. 115-119). The Court of Appeals thereupon amended its judgment so as specifically to direct the District Court to enter a preliminary injunction, and ordered issuance of its formal mandate to the District Court (R. 119-121).[7] It is this amended judgment which is under review in this case.

SUMMARY OF ARGUMENT

I.

A. The Act provides a single sanction, criminal prosecution, for falsification of a 9(h) affidavit. The Board now asserts an inherent power to decomply a union as an added consequence of falsification. Decompliance injures a union as a whole and has a disruptive effect on collective bargaining and the stability of labor relations. It is inconceivable that Congress could have left for implication a remedy so

[7] The District Court thereafter entered a preliminary injunction. There have been no further proceedings in that court.

much more drastic, far-reaching, and controversial than that which it expressly provided. The Board is seeking to create a power which requires legislation.

B. The legislative history of the Act shows that Congress meant to withhold from the Board the functions of determining whether Union officers were Communists and of decomplying unions having such officers. Congress rejected a provision which would have given the Board these functions in favor of a system of requiring union officers to file non-Communist affidavits under the penalty of perjury. The Board is now violating the intent of Congress by asserting the very power of administrative investigation and decomplian which 9(h) was designed to keep from the Board. The Board itself for years repeatedly recognized that such was the legislative intent and that criminal investigations are inconsistent with its role as a quasi-judicial agency.

The legislative history also shows that Congress believed that the criminal sanction for false 9(h) affidavits was fully adequate to implement the policy of excluding Communists from union office. Congress saw no need for the added measure of decompliance of the union.

Contrary to the Board's claim, the provision for administrative decompliance rejected by Congress was not objectionable on grounds that it required Board investigations of all union officers and made the subject of Communism litigable in regular Board proceedings. The rejected provision would have given the Board exactly the power, claimed by the Board here, of making investigations on a selective basis in ad hoc proceedings. Likewise, the Board's present de-

compliance procedure is as productive of delay as that which Congress rejected.

C. The decompliance power claimed by the Board is in several respects inconsistent with the statutory scheme and overall policy.

It is obviously incongruous for a quasi-judicial agency to undertake the functions of making criminal investigations, and it is offensive that an individual's guilt of a serious crime should be determined in an administrative proceeding.

Furthermore, decompliance is inconsistent with the overall purposes of the Act because it disrupts the stability of union-employer relationships and interferes with the democratic selection of union officers. Decompliance retroactively cancels all benefits acquired by a union under the Act for the period in which a false affidavit had compliance vitality. It invalidates union certifications and collective bargaining contracts and allows unfair labor practices to go unredressed. The possibility of a wholesale disruption by retroactive decompliance exerts pressure on unions to select their officers not by democratic preference, but according to the degree to which the individuals' political purity is above suspicion. As a practical matter, this puts unions under compulsion to reject militant or non-conformist leaders.

D. The decompliance power is inconsistent with the Communist Control Act of 1954. That Act causes unions to lose their compliance status on a finding by the Subversive Activities Control Board, sustained on judicial review, that they are "Communist-infiltrated." Congress therefore legislated a different standard for decompliance than that advanced by the

Board, entrusted determination to another agency, avoided the disastrous retroactive effects of the Board's decompliance policy, and provided for judicial review before decompliance becomes effective.

The Board's action also violated the Administrative Procedure Act because it represented ad hoc rule-making without observance of that statute's requirements of notice and publication of proposed rules.

II.

"Membership awareness" of the falsity of an officer's affidavit can not supply a decompliance power which the Board does not otherwise have. The Board itself recognizes as much.

Congress felt that the criminal penalty for false affidavits was the appropriate and adequate method for implementing the policy of excluding Communists from union office, and it meant to exclude Board investigation of the Communist issue. These considerations apply whether or not there is membership awareness, and hence that element cannot afford the Board jurisdiction.

III.

Even if the Board has the decompliance power, the judgment below is correct, since the power was wrongfully exercised in this case. The Board's findings are not supported by the evidence, and the Board excluded relevant evidence. Furthermore, a preliminary injunction was appropriate pending final determination of the litigation in view of the substantial issues involved and the irreparable injury to the Union of having decompliance effective during the litigation. These questions are not briefed, however, since the court below did not consider them. As the

Board suggests, if the Court finds that the Board has the decompliance power, it should remand the case to the court below for determination of the remaining issues.

ARGUMENT

I. THE BOARD DID NOT HAVE POWER TO INVESTIGATE THE TRUTH OF THE 9(h) AFFIDAVITS AND TO DECOMPLY THE UNION.

The decompliance power claimed by the Board is inconsistent with the terms of the Act, with the intent manifested by the legislative history, and with the statutory scheme and policy.

A. The Decompliance Power Is Inconsistent with the Act's Terms

The Act by its terms provides a single remedy for the falsification of a 9(h) affidavit, namely, criminal prosecution under section 35A of the Criminal Code (now 18 U.S.C. 1001). The Board now seeks to add a consequence of falsification which Congress did not mention. This consequence, unlike that provided in the Act, is visited not on the particular malefactor, but on the union as a whole. The Board is therefore, seeking to create a policy "as reckless as firing a shotgun into a crowd of people in an effort to stop one who is picking their pockets." *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, 39.

Furthermore, the Board's sanction, unlike the Act's, has a major and disruptive impact on the process of collective bargaining and the stability of labor relations which the Act is designed to promote. It vitiates existing collective bargaining contracts, past elections and certifications of collective bargaining representatives, and past determinations of employer unfair labor practices. See *infra*, p. 19.

It is inconceivable that Congress could have left for implication a remedy so much more drastic, controversial, and far-reaching than that which it expressly provided. In applying that remedy the Board has engaged in lawmaking. The power it claims is simply too important, too extensive, and too debatable, to be conjured from a nebulous "inherent" authority of an administrative agency. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. The elaborate decompliance scheme proposed by the Board should not be created except by legislative enactment following legislative consideration of its dubious policies.

The Board rests its claim to an inherent power of decompliance on an observation in *N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18-19 (cited Pet. Br. 25), that the Board "may decline to be imposed upon or to submit its process to abuse." But that case has no resemblance to this one. It did not enlarge the powers granted to the Board by the statute, but merely reminded the Board that under the statute it had a wide discretion in the issuance of complaints. Congress, however, did not leave to the Board the function of determining which labor unions could have access to the Board's processes. Instead, Congress itself determined those conditions, leaving no room for the Board to impose additional conditions, to cancel accrued benefits, and to exclude from the Act's coverage unions which qualify on Congress' terms.

B. The Legislative History Shows that Congress Intended to Withhold Decompliance Power from the Board

Moreover, it was the intention of Congress to keep from the Board the power it claims here.

As the Board's brief points out (pp. 33-35), section 9(h) was a Conference substitute for a provision contained in the reported House bill and added to the Senate bill by a floor amendment offered by Senator McClellan. The original provision would have prohibited certification of a labor organization any of whose officers was a member of the Communist Party. Section 9(h) substituted the non-Communist affidavit requirement in order to eliminate the impracticality of having the Board determine "whether a man was a Communist" (Pet. Br. 35). Unions with Communist officers were to be excluded not through the administrative process, but as a result of the threat or actuality of criminal prosecution for persons filing false affidavits.[8]

The Board's position in this case, therefore, violates the purpose and scheme of the statute. It asserts the very power of administrative investigation and decompliance which 9(h) intended to keep from the Board. That such was the intention of 9(h) was, as we have seen (*supra*, p. 2, ftn. 1), repeatedly recognized by the Board itself until, for undisclosed reasons, it suddenly and belatedly made an about turn. See material quoted in Petitioner's Brief in No. 40, pp. 13-15. What is more, the Board itself applauded the wisdom of Congress in withholding from the Board the power now claimed by it. On March 18, 1952, Board Chairman Herzog testified before a Senate Committee:

> "We doubt, however, whether it would be advisable to modify the Board's existing affirmative

[8] The legislative history is reviewed in the brief for petitioner, pp. 12-13, in the case scheduled for argument just before this case. *Amalgamated Meat Cutters* v. *N.L.R.B.*, No. 40 this Term.

> authority by conferring upon it, as suggested by some, the power and responsibility of determining whether a particular labor organization is in fact 'Communist-dominated.' As noted at the outset of this statement, Congress wisely spared the N.L.R.B. that task in 1947, although it had been imposed in earlier versions of that year's legislation. We believe that it would be a mistake to change that approach today. There are two principal reasons: First, if this Board is expert in anything, it is in the area of collective bargaining. The field of subversive activities, where proof is notoriously difficult to obtain, calls for a different sort of expertise and for special investigative techniques, not only unfamiliar to our staff but inconsistent with the open-court procedures of a quasi-judicial agency." (*Hearings before Senate Subcommittee of Committee on Labor and Public Welfare, Communist Domination of Unions and National Security, p. 94.*)

The legislative history also shows that Congress felt that the criminal penalty for a false non-Communist affidavit was sufficient to implement the policy of excluding Communists from union office, and that it recognized no need to bolster this penalty by a sanction of administrative decompliance. As Senator Taft stated in an analysis of the bill: "Under the [Conference] amendment an affidavit is sufficient for the Board's purpose and there is no delay unless an officer of the moving union refuses to file the affidavit required" (93 Cong. Rec. 7002; 2 Leg. Hist. 1625). The Conference report itself made no reference to the possibility of administrative decompliance as an additional means of implementing the exclusionary policy, and merely called attention to the fact that "if an officer of a labor organization files a false affidavit

with the Board, he will be subject to the penalties prescribed in section 35A of the Criminal Code." (House Conference Report No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 49; 1 Leg. Hist. 553). Senator Taft, when presenting the Conference Report, specifically called attention to the fact that, "The penal provisions of section 35A of the Criminal Code (U.S.C., title 18, sec. 80) are made applicable to the execution of such affidavits" (93 Cong. Rec. 6602; 2 Leg. Hist. 1542). In debate he said (93 Cong. Rec. 6604; 2 Leg. Hist. 1547):

> "Today it is provided that officers shall file statements to the effect that they are not Communists. If a man who files such a statement tells an untruth he is subject to the same statute under which Marzani was convicted last week. That seemed a fair modification to make, although it was not in the House bill."

These repeated references, and particularly the tenor of the one last quoted, indicate a satisfaction with the criminal penalty standing alone. They reflect no feeling that the penalty was inadequate to exclude Communists from union office and needed to be supplemented by police work on the part of the Board. Congress did not share the Board's view (Br. 31) that the criminal penalty is "a feeble reed" for keeping Communists out of union office.

The Board now seems to argue (Br. 34-35) that Congress' only objection to the original House provision was that it required Board investigations of all union officers and made the subject litigable in regular Board proceedings rather than in ad hoc proceedings. This argument reduces to trivia the actual purposes of Congress in substituting an affidavit re-

quirement for a system of Board determination of "whether a man was a Communist." Congress recognized, as well as did Chairman Herzog on March 18, 1952, that the Board was not equipped to investigate such subjects and that criminal investigations are "inconsistent with the open-court procedure of a quasi-judicial agency."

Furthermore, the Board's argument rests on a misreading of the rejected House provision. As we have seen, the House version was added to the Senate bill by an amendment introduced by Senator McClellan, and he stated that it contemplated selective, ad hoc inquiries. The following colloquy on the floor between Senators McClellan and Ferguson on the McClellan amendment shows that the rejected version would have given the Board precisely the authority it now claims.

> "Mr. Ferguson: How would such a matter [Communist leadership of a union] be brought before the Board? I find nothing in the amendment respecting how the question should be brought before the Board.
>
> "Mr. McClellan: I think the Board could inquire into the matter upon its own volition. I do not think it would be necessary for the Board to inquire into the case of every officer, of course; but it would be like barring a Communist from working for the Government; when it was discovered that an individual was a Communist, of course he could be discharged. . . ." (93 Cong. Rec. 5095; 2 Leg. Hist. 1435.)

Nor is it true, as the Board urges, that separate decompliance proceedings do not delay disposition of regular Board cases involving the union whose officer

accused of having filed a false affidavit. The contrary is proved by this very case. As the Board states (Br. 4), the decompliance proceeding was initiated in this case following allegations made in 1953 by the Precision Scientific Company in an unfair labor practices proceeding. A hearing examiner found on October 21, 1953, that the Company had violated the Act by refusing to bargain with the Union. The Board, however, has frozen the case at that point, having refused to consider it while the decompliance proceeding was pending and during this litigation. The result is that the Company has still not been ordered to bargain with the Union.

As for decompliance as a result of a criminal conviction of an officer for filing a false 9(h) affidavit—a power also asserted by the Board—the choice there is between delay or disruption. The delay occurs if the Board holds in abeyance, pending appeal of the conviction, cases involving the union whose officer was convicted. The disruption occurs if the Board immediately treats the union as out of compliance and thereafter the conviction is reversed on appeal. The Board states (Br. 22) that its first decompliance action was taken against a local of the United Packinghouse Workers upon the conviction of an official of that union. What it does not mention is that the official's conviction was reversed on appeal (*United States* v. *Valenti*, 207 F. 2d 242), and that the official has never been retried. Thus the Board's first venture into the area of decompliance caused an irreparable and unjust disruption of a union's bargaining relationships and rights under the Act.

C. Decompliance Is Inconsistent with the Statutory Scheme and Policy

The decompliance power claimed by the Board is in several respects inconsistent with the statutory scheme and overall policy.

1. First, it is manifestly incongruous for a quasi-judicial agency to undertake the function of making criminal investigations, and it is offensive that an individual's guilt of a serious crime should be determined in an administrative proceeding.[9] By providing for affidavits and a criminal sanction, the Act contemplates enforcement by police investigations and court prosecutions, processes which naturally exclude concurrent administrative action along identical lines. The original House provision which section 9(h) superseded would not have involved such a situation. That provision was not subject to criminal enforcement and therefore would not have produced the anomaly of Board investigation and determination of crime.

As this case vividly illustrates, there is real danger that a quasi-judicial agency will be corrupted by assuming the function of criminal investigations, particularly in the field of Communism. The Board here, in its zest to make a case against Travis and the Union, abandoned all semblance of objective consideration and made palpably dishonest findings. See *supra*, pp. 4-7.

2. Exercise of the decompliance power is inconsistent with the overall purposes of the Act because it

[9] These features are not involved in decompliance of the union as the result of a criminal conviction of the officer for falsifying a 9(h) affidavit. Decompliance for a conviction is impracticable, however, because convictions may be reversed on appeal.

disrupts the stability of union-employer relationships and interferes with the democratic selection of union officers. The Board argues (Br. 31) that the decompliance power would effectuate the "broad" anti-Communist objective of section 9(h). One must assume, however, that Congress did not mean to do so by sacrificing major values which the Act is designed to serve.

Decompliance of a union on a determination that a 9(h) affidavit is false, whether the determination is made administratively by the Board or in a criminal conviction, means retroactive cancellation of all benefits acquired by the Union under the Act during the period the affidavit had been treated as valid.

In the present case, Travis is no longer an officer of the Union, and the Union's compliance status since February 23, 1955 is acknowledged by the Board (Br. 9, ftn. 3). The Board, however, seeks to nullify all benefits acquired by the Union under the Act between August 1949 and February 23, 1955 (*ibid.*). If the Board is successful, all certifications issued to the Union during a period of five and a half years are revoked. By the same token, all contracts between the Union and employers based on certifications issued during those years are invalidated. And unfair labor practices committed against the Union or its members during that period will go unredressed.

The possibility of a wholesale disruption by retroactive decompliance may have even more pernicious effects than decompliance itself. It exerts pressure on labor unions to select officers not by democratic preference, but according to the degree to which the political purity of the individuals is above suspicion.

As a practical matter, it places unions under a compulsion to reject militant or non-conformist leaders, even though these latter are not Communists, are willing to swear that they are not, and are believed by the union membership.

D. Decompliance Is Inconsistent with the Communist Control Act, and the Board's Action Violated the Administrative Procedure Act.

1. The power claimed by the Board is inconsistent with the Communist Control Act of 1954, 68 Stat. 775. That Act causes unions to lose their compliance status under the Labor Management Relations Act on a finding by the Subversive Activities Control Board, sustained on judicial review, that they are "Communist-infiltrated."[10] This employs a different standard for decompliance than that advanced by the Board; it entrusts determination to another agency; it avoids any retroactive effects of decompliance; and it provides for judicial review before decompliance becomes effective. The Board's exercise of decompliance power goes far beyond, and is not compatible with, the measures which Congress thought desirable to eliminate Communist influence in labor unions.

2. The Board's action violated the Administrative Procedure Act. The Board created a new principle, not provided for in its existing regulations, that it would cancel the compliance status of unions upon Board determination that a 9(h) affidavit was false to the knowledge of the union membership. This was

[10] Secs. 7, 9, 10, and 11 of the Communist Control Act, 68 Stat. 777-780, 50 U.S.C. (pocket part) secs. 782 (4A) and (5), 791 (e)(3), 792a, 793.

"rule-making," as defined by section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(2)(c). The Board, however, did not comply with section 4 of that Act, 5 U.S.C. 1003, as to notice and publication of proposed rule-making. Such ad hoc, informal rule-making and actions taken pursuant thereto are void. *Camp* v. *Herzog*, 104 F. Supp. 134.

II. "MEMBERSHIP AWARENESS" DOES NOT SUPPLY THE DECOMPLIANCE POWER.

It is apparent that the Board places little stock in any theory that membership awareness of the falsity of an officer's affidavit supplies a decompliance power which the Board would not otherwise have. The Board was driven to the theory by judicial rulings adverse to its position that falsity alone is cause for decompliance. See *supra*, p. 3. The Board's justification of the claimed power does not depend on membership awareness, and the Board itself asserts (Br. 36-38) that there is little or no reason to distinguish in favor of "innocent" members.

As we have seen, Congress felt that the filing of non-Communist affidavits under the sanction of a criminal penalty was the appropriate and adequate method for implementing the policy of excluding Communists from union office. Congress meant to exclude Board investigation of the Communist issue. Board investigation and decompliance is inconsistent with the policies and scheme of the Act. All of these considerations apply whether or not there is membership awareness, and hence the presence, actual or claimed, of that element cannot afford the Board jurisdiction. And since the Board has no power to investigate whether a 9(h) affidavit is false, it can have no power

to investigate membership awareness of falsity, the latter inquiry being dependent on the former. As stated in *Farmer* v. *International Fur & Leather Workers Union*, 221 F. 2d 862, 864:

> "The absence of authority in the Board to deprive the Union of its compliance status under § 9(h) cannot be supplied by membership awareness of the falsity of the affidavit. Congress explicitly provided a criminal penalty for false non-Communist affidavits. It assumed that this threat of criminal sanctions would be a sufficient deterrent to false swearing by union officers. If these sanctions have proved insufficient, it is for Congress, not the Board, to provide new ones."

Membership awareness is not a meaningful concept, and it is inconceivable that Congress meant to have the Board pursue such a will-o'-the-wisp. The awareness cannot be imputed to the members by virtue of the knowledge of the agent who executes the affidavit, for such vicarious knowledge is always present. But how does one establish the awareness of thousands of union members, or, for that matter, of a million or more? Obviously the members will not have a single awareness on any one subject. And is the awareness that of all the members, of most, or only of some? Inquiry into membership awareness leads only to a quagmire. So here the Board could resolve the subject only by desperate means. On the one hand it made the fatuous finding that 100,000 members of the Union knew Travis' affidavits were false because the Union newspaper published his statement affirming that one of his affidavits was true. And on the other it made the incredible ruling that evidence that the Union members believed the affidavits were truthful was

irrelevant to the inquiry of whether they were aware that the affidavits were false. See *supra*, pp. 5-7.

III. THE JUDGMENT BELOW IS SUSTAINABLE ON GROUNDS OTHER THAN THE BOARD'S LACK OF POWER.

If, contrary to our argument, the Board has the decompliance power, nevertheless, the judgment below is correct. As our statement of the case shows, the decompliance power, if it exists, was not properly exercised. The Board's findings were not supported by the evidence and rested on extravagant inferences, and the Board erroneously excluded relevant evidence offered by the Union. Moreover, the judgment below is not a final disposition of the controversy, but merely directs issuance of a preliminary injunction pending the litigation. This interim relief is clearly warranted in view of the substantial nature of the questions involved and the irreparable injury which the Union will suffer if decompliance is effective pending the litigation. *Perry* v. *Perry*, 88 App. D.C. 337, 190 F. 2d 601.

However, we do not brief these points, since we share the Board's view (Br. 40) that if the Court decides that the Board has the decompliance power, the appropriate course would be to remand to the court below to determine the remaining questions in the case.